No. 11142

In the United States Circuit Court of Appeals for the Ninth Circuit

F. M. O'CONNOR, STELLA M. O'CONNOR, W. H. MORRISON, AND R. J. MIEDEL, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the district court is found at pages 77–82 of the Record.

JURISDICTION

This is an appeal from a judgment in a condemnation proceeding entered August 24, 1944 (R. 83–89). Notice of appeal was filed November 22, 1944 (R. 90).

The jurisdiction of the district court rests upon the Act of August 1, 1888, c. 728, 25 Stat. 357, 40 U. S. C. sec. 257. The jurisdiction of this Court rests upon section 128 of the Judicial Code, as amended, 28 U. S. C. sec. 225 (a).

QUESTION PRESENTED

The United States instituted proceedings to condemn the right of possession of certain property, together with the right to remove gravel therefrom, for a period of two years, for the construction of a dam. The gravel was gold bearing and provision was made in the complaint for recovery of the gold by the owners from the gravel to be removed by the Government. Under a court order, the United States took possession of the property but removed no gravel. One year and eleven months after taking possession, it filed notice of abandonment of the proceeding. The question presented is whether the United States must pay for all the gravel, including its gold content, which it is alleged might have been removed under the interest described as sought in the condemnation complaint or whether it need pay only for the loss actually suffered by the owners in being deprived of possession for one year and eleven months.

STATEMENT

On October 10, 1939, the United States, at the request of the Secretary of War, instituted proceedings to condemn the right to remove gravel (concrete aggregates) from certain land in Placer and El Dorado Counties, California, for use in the construction of the Ruck-a-Chucky Dam and Reservoir on the Middle Fork of the American River which was authorized by the Act of August 30, 1935, 49 Stat. 1028, 1038, to prevent the flow of debris from hydraulic mining and natural erosion on the Middle Fork of the American from obstructing and interfering with navigation on

the Sacramento River and its tributaries (R. 2–37). An order granting immediate possession to the United States was entered on the same day under authority of Section 5 of the River and Harbor Act of July 18, 1918, 40 Stat. 911, c. 155, 33 U. S. C. sec. 594 (R. 38–40, 13–14).

The land described in the complaint consisted of 40.34 acres of land containing a deposit of gold-bearing gravel and was the subject of a mineral location claim filed August 28, 1934, by F. M. O'Connor, Stella M. O'Connor, D. A. Crone, and F. A. Crone (R. 64). It was leased by them on October 31, 1934, to R. J. Miedel and associates for a period of 5 years or until the mine (which was a placer mine) was fully worked (R. 64–68). The requirements of the lease were suspended pending litigation involving the claim (R. 70, 72–73, see R. 131). The lessees, R. J. Miedel and associates, acquired the interest of D A. Crone and F. A. Crone in the property and it was agreed that a patent should be applied for in the name of the O'Connors as owners of a half interest and R. J. Miedel as owner of the remaining one-half interest (R. 71–72). The requirements of the lease were again suspended until 30 days after final determination of the Government on the patent application or 30 days after final determination of the litigation, whichever was later (R. 72–73). On May 4, 1939, an amended lease for an additional 5 years was executed by the O'Connors as lessors and Miedel as lessee, which recited that mining had been impractical for more than 4 years because of the pending litigation and the pending patent application, that the United States

had indicated its intention to condemn the right to remove gravel unless satisfactory negotiations were concluded and that said condemnation would preclude mining for a further period not exceeding 3 years (R. 58–59). Mining was permitted at once and required not later than 90 days after issuance of the patent (R. 60). By the terms of the lease, the lessee was not to be excluded during the Government's possession, but working requirements were to be suspended for such period and the lease extended pro tanto (R. 60). The patent was issued August 28, 1940 (R. 277; see R. 150). The appellants here are the O'Connors, owners of an undivided one-half of the property, R. J. Miedel, owner of the remaining one-half and lessee of the mining rights, and W. H. Morrison who was one of the associates under the original mining lease (see R. 64–68). The latter's interest in the property was assigned to Miedel prior to the patent application (R. 191) and his present interest in the property does not appear in the Record (cf. R. 227–229).

The estate or interest which the United States sought to take was the right, power, and privilege of uninterrupted use and occupancy of the land for a period of 2 years from and after the entry by the district court of an order of immediate possession for the purpose of and with the right, power, and privilege during those two years to remove concrete aggregates in such quantity and in such manner as might be found by the United States to be expedient, necessary and proper in constructing the Ruck-a-Chucky Dam and Reservoir project, provided that in the

process of removing the concrete aggregates provision would be made for the recovery by the owners of the gold contents of such materials in a manner specifically set out in the complaint (R. 11–12, 7–9, 28–32). The provisions for recovery of gold were that the sand and gravel plant to be constructed by the United States would be so constructed as to permit the owners to install gold recovery devices having specified vertical drops, that the United States would deliver the material excavated in certain separate sizes, furnish water and electric power for the gold recovery devices and that the owners would return the materials after removal of gold to the United States (R. 7–9, 28–32). The petition further provided that if the owners failed or refused to remove the gold in accordance with the specifications, the United States should have the option either to take the concrete aggregates without recovery of gold or to remove the gold as specified (R. 9–10), but the judgment prayed for did not include the latter alternatives (see R. 28–34).

On March 25, 1941, the landowners answered the complaint, alleging among other things that the United States had abandoned its plans for the construction of the dam and that it was seeking to take their lands for another and different dam from that authorized by the Act of August 30, 1935, 49 Stat. 1028, 1038 (cf. R. 4) and described in the complaint (R. 41–43, 48). The owners also alleged that the provisions set forth in the complaint for the recovery of the gold content of the material to be taken were inadequate and prejudicial to them in that no rate of extraction of material was specified, making it impossible to know whether the amount of water and

electricity to be furnished would be adequate or whether the gold recovery device with the vertical drops specified would be adequate (R. 43–45). Damages were alleged on the basis of a taking of the gold (R. 49), on the basis of interest on the amount of profits which it was alleged could have been made by mining the property during the two-year period sought by the United States (R. 50) and on the basis of the value per cubic yard of the sand and gravel which might be removed, the quantity being at the time unknown (R. 50). Judgment was sought fixing the amount of damages found to have been sustained and denying the United States the right to take any part of the property described in the complaint (R. 56–57).

On September 13, 1941, the United States filed notice of abandonment of the condemnation proceeding and moved to dismiss the proceeding on the ground that the acquisition of an interest in the land was not necessary or to the best interests of the United States (R. 73–75). The motion for dismissal was denied and the case set for hearing (R. 76). A jury trial having been waived, the case was heard by the district court sitting without a jury (R. 94).

It appeared at the trial that although the United States had obtained an order granting it immediate possession of the estate sought to be condemned (R. 38–40), no gravel, or at the most only 2 truckloads was ever taken from the property. Counsel for the owners said in his opening statement that there was "no doubt that no gravel was ever taken by the Government" (R. 137). A civil engineer from the

United States Engineer's Office testified that none was ever taken (R. 107). W. H. Morrison, one of the appellants, testified he saw two truckloads of gravel leave the property but it was not clear that they were actually taken from it (R. 256, 270–272). The only acts of possession were the cutting of a path and erection of a power line by the Government contractor prior to the institution of the condemnation proceedings (R. 258–259), stacking some lumber on the property, storing some powder kegs, and putting a lock on the gate to which Mr. Morrison, one of the appellants, and one of the contractor's foremen had keys (R. 197–206). No effort was made to show that the gravel was of any value except for its gold content. In fact, it is conceded that there was no market for the gravel and that the only value which the property had was for gold mining (cf. R. 269–270, 411; Br. 6). However, it was contended that even though the condemnation petition contained provisions to enable the owners to recover the gold content, such provisions were inadequate and that, therefore, the rights which the United States sought to condemn included the right to take the gold (R. 135–137). It was further contended that even though the United States had done no more than take possession of the property and had never removed any gravel, it must pay for the right to remove all the gravel in the property, including its gold content (R. 137–143).

To support their contention that the interest sought necessarily included the right to take the gold as well as the gravel, appellant Morrison testified that the

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gold recovery device specified in the complaint in condemnation, operating with the 2,100 gallons of water per minute and electrical energy of 20 horsepower to be furnished by the United States, could not handle gravel in excess of 100 cubic yards per hour; and that while it was understood at the negotiations prior to the institution of the condemnation proceeding that the Government contractor removing the gravel would be limited to 100 cubic yards per minute, it was later learned after the suit was filed that the contractor insisted he was going to use a gravel plant with a capacity of 250 cubic yards per minute (R. 222–225). However, no plant was ever set up (R. 225).

Much testimony concerning the negotiations which preceded the condemnation proceeding was introduced, apparently to show that the United States intended, by seeking the interest described in the complaint, to take an unlimited amount of gravel and that this would include all of the gold (cf. R. 207–212, 215–225, 278–284; Br. 8, 27). This testimony may be summarized as follows: On direct examination Morrison testified that throughout the negotiations the Government representatives refused to agree to limit the amount or places from which gravel would be removed (R. 207–212). He also testified that the specifications in the complaint for the gold recovery device to be used by the owners differed from the one discussed previously in that the complaint provided for a 20-foot vertical drop for the finer gravel and an 8-foot drop for the larger gravel whereas in the discussions, a 20-foot drop was specified for the coarser gravel and an 8-foot drop for the finer (R.

216–219). He did not state the significance of this deviation, but on cross-examination he admitted that it may have been a typographical error (R. 236). On cross-examination he also stated that 70,000 to 100,000 cubic yards was discussed as the quantity needed for the construction of the dam, but that it was indefinite (R. 226). Miedel, who owns a half interest in the property and is the mineral lessee, testifying at length concerning the negotiations (R. 278–284), stated that the Government would not agree to limit the quantity of gravel to be taken (R. 280, 283–284). Upon the Government's objection that it was cumulative and irrelevant to a determination of what was actually taken, or even what was sought in the complaint, testimony by Mr. Cornish, counsel for the owners, as were letters written by the parties during the negotiations, was excluded (R. 337–357).

In addition, appellant Morrison testified on direct examination as to tests of the gold content of the property (R. 179–190). On cross-examination he stated that the property contained 1,300,000 cubic yards of gravel (R. 242). Another witness, Mead, testified to a particular type of suction dredge which he stated, over the Government's objections to his qualifications, could be operated to remove the gold from appellants' property (R. 301–319) and that it would cost about $22,000 (R. 319). A qualified mining engineer, Wiltsee, testified for appellants that the property could best be mined by a dragline plant and that the cost per yard of dredging would be about 12 cents a yard (R. 322–323, 328–329). Wiltsee also testified to tests he had made of the gold content

of the sand (R. 323–325). On cross-examination, he testified that he thought appellants' property would produce 25 to 35 cents per cubic yard, that it contained 600,000 cubic yards of workable gravel and would dredge about $200,000 (R. 336–337).

On behalf of the United States, Goodall, the engineer in charge of estimating the cost of construction of the dam, stated that in May, 1935, it had been estimated that 75,000 cubic yards of concrete aggregates would be necessary (R. 106), but that a rock slide at the site of the dam had led to its abandonment and that no gravel had ever been removed from appellants' property (R. 107–111).

Fraser, another Government engineer, testified that appellants' land contained 527,000 cubic yards of workable gravel (R. 366). Another Government witness, Bishop, who was in the contracting and mining business (R. 367–368, 381–382) testified that the highest and most profitable use to which the property could be put was dredge mining and that the fee value of the property, including the gold, and based upon 600,000 cubic yards of workable gravel was between $12,000 and $13,000 (R. 371–372, 379–383). He also testified that the right of use and occupation of the property without the right to mine or use it would have no rental value, but that interest at a reasonable rate on the value of the property would measure its value (R. 385–386).[1] This witness also testified to gold tests

[1] In objecting to testimony as to the value of the mere right of possession, counsel for appellants conceded that it was worth no more than one dollar—"in fact, I will stipulate it has no value without the right to take minerals" (R. 384–385).

made under his supervision (R. 387–394). On cross-examination, he stated that the property could be completely mined in one year and eleven months, that the value of the right to remove gravel and minerals for that time would be the same as the fee value $12,000 to $13,000, and that the average value per cubic yard as shown by his tests was 34.1 cents (R. 411–412, 417). Smith, who was engaged in the mining business and whose qualifications were conceded by counsel for the owners (R. 417–421), testified that the highest and best use of the property was mining and that its value for that purpose was $12,000 (R. 425–426). He also stated that the full value could be removed in two years, but that compensation for the mere right of occupation and possession for one year, eleven months would be a reasonable rate of interest—between 4 and 7% (R. 426–427). On cross-examination he testified that the right to remove gravel and minerals for one year and eleven months would be $12,000 (R. 430).

On March 6, 1944, the trial court filed its opinion (R. 77–82) holding that the owners were not entitled to recover the full value of the right to remove all of the sand, gravel, and gold and that no diminution in the market value of the land had been shown as a result of any acts committed by the United States. He further held that they were entitled to recover for the taking of possession by the United States for the period of its occupancy. Pointing out that there was no evidence of rental value, but that there was sufficient evidence upon which to base an award of compensation having reasonable relation to the detri-

ment suffered by the owners by reason of the Government's use and occupation of the property, the court stated that interest at the prevailing commercial rate on the highest fee value testified to ($13,000) would afford just compensation for the actual loss sustained. On August 24, 1944, the court made the following findings of fact and conclusions of law, among others: that the land was returned to the owners in the same condition as when entered upon by the United States (R. 87); that the United States took no gravel, sand or other material from the land between October 17, 1932, and September 13, 1941, and exercised no other rights than to use and occupy and that there was no consequent diminution in the value of the land (R. 87); that the owners have suffered no pecuniary loss over and above use and occupancy (R. 87); and that $1,745 with interest at 7% from October 17, 1939, until paid was full, adequate and just compensation for the interest taken (R. 88).[2] Judgment was entered accordingly (R. 89). This appeal followed (R. 90).

ARGUMENT

I

Appellants were not entitled to recover a substantial award for the alleged taking of the right to remove gravel and gold which was never exercised

Appellants make no complaint of the determination that $1,745.00 plus interest represented just com-

[2] This sum is approximately interest at 7% on $13,000 for the one year and eleven months during which the United States had possession.

pensation for occupancy by the Government of the land for one year and eleven months (Br. 17, 41). Their appeal is based solely on the claim that substantial compensation should be awarded for the alleged taking of the right to remove gravel and gold. Moreover, appellants admit that they have not actually suffered monetary loss (Br. 2–3). Their contention is that nevertheless they are entitled to the value of a profit a prendre alleged to have been taken, which, they claim, was equal to the value of the fee simple (Br. 33, 51–52). We submit that the court below was clearly correct in rejecting this claim for several reasons.

A. *Under the Constitution, appellants are not entitled to recover a substantial award for a merely theoretical taking.*—In *Marion &c. Railway* v. *United States,* 270 U. S. 280 (1926), the Supreme Court made it perfectly clear that when the United States sets out to acquire private property for public use but never exercises the rights originally sought, the owner is entitled to recover compensation only for what he has actually been deprived of. In that case, the President had, as authorized by statute, issued a proclamation taking possession and assuming control of all railroads. The Marion Railway brought suit to recover compensation for alleged use and occupancy from the date of the proclamation until the date the alleged control expired. The United States contended that the President had not taken actual possession of the railroad, had not operated it, or otherwise exercised control. The Supreme Court affirmed a judgment for the United States, saying at page 282:

> We have no occasion to determine whether in law the President took possession and assumed control of the Marion & Rye Valley Railway. For even if there was technically a taking, the judgment for defendant was right. Nothing was recoverable as just compensation, because nothing of value was taken from the company; and it was not subjected by the Government to pecuniary loss.

Appellants concede that the action of the district court would have been correct "had this been a suit in the Court of Claims for actual damages suffered" (Br. 2–3, 39, 41). They assert, however, that a different rule is applicable in condemnation proceedings and presumably they would say that the *Marion Railway* case is inapplicable because it was instituted in the Court of Claims. This alleged distinction between suits in the Court of Claims and condemnation proceedings lacks merit.

Whether the remedy be under the Tucker Act, in condemnation proceedings or under special statute, the landowner is asserting the right to recover the just compensation which is guaranteed to him by the Fifth Amendment. While Congress can enlarge the landowners' rights, it cannot limit them more narrowly than the Constitution provides. *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312 (1893). In this condemnation proceeding no statute has enlarged appellants' rights and their claim for compensation arises out of the Fifth Amendment (cf. Br. 37, 39). In *Jacobs* v. *United States,* 290 U. S. 13, 16 (1933), a suit brought in a federal district court under the Tucker Act, the court said:

> * * * The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. * * *

And in *Hurley* v. *Kincaid,* 285 U. S. 95 (1932) the court said (p. 104):

> * * * If that which has been done, or is contemplated, does constitute such a taking, the complainant can recover just compensation under the Tucker Act in an action at law as upon an implied contract, since the validity of the Act and the authority of the defendants are conceded. *United States* v. *Great Falls Mfg. Co.,* 112 U. S. 645, 658; *Great Falls Mfg. Co.* v. *Attorney General,* 124 U. S. 581, 600; *Tempel* v. *United States,* 248 U. S. 121, 129; *Marion & Rye Valley Ry. Co.* v. *United States,* 270 U. S. 280, 283. The compensation which he may obtain in such a proceeding will be the same as that which he might have been awarded had the defendants instituted the condemnation proceedings which it is contended the statute requires.

Thus, in the Court of Claims the standard of compensation set forth in the Fifth Amendment is controlling to the same extent as it governs condemnation proceedings. The *Marion Railway* case cannot, therefore, be distinguished here.

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As we have pointed out, *supra,* pp. 12–13, the judgment below represents adequate compensation for the actual loss that has been suffered by appellants. The court said in *Bauman* v. *Ross,* 167 U. S. 548, 574 (1897):

> * * * The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public.

See also *Roberts* v. *New York City,* 295 U. S. 264, 282 (1935); *Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189, 195 (1910); *United States* v. *Miller,* 317 U. S. 369, 375 (1943). We submit, therefore, that to award appellants any substantial sum for the technical taking of the so-called profit a prendre would be "unjust to the public."

B. *After abandonment by the Government the court below lacked jurisdiction to award compensation for the alleged taking of a profit a prendre.*—When private property is sought to be acquired under the power of eminent domain, unless it is acquired under specific statutory proceedings providing otherwise,[3] the title does not pass until compensation is actually paid to the owner. "Within the meaning of

[3] For example, the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, c. 307, 40 U. S. C. sec. 258a, provides that upon the filing of a declaration of taking and the deposit in court of estimated compensation "title * * * shall vest in the United States * * * and the right to just compensation for the same shall vest in the persons entitled thereto."

the Constitution, the property, although entered upon, * * *, is not taken until the compensation is ascertained in some legal mode, and, being paid, the title passes from the owner." *Cherokee Nation* v. *Kansas Railway Co.*, 135 U. S. 641, 659 (1890). As the Supreme Court said in a more recent case, *Hanson Co.* v. *United States*, 261 U. S. 581 (1923) at p. 587:

> The owner is protected by the rule that title does not pass until compensation has been ascertained and paid, nor a right to the possession until reasonable, certain and adequate provision is made for obtaining just compensation.[4]

In *Danforth* v. *United States*, 308 U. S. 271 (1939) the court explained the nature of condemnation proceedings as follows (p. 284):

> * * * The determination of the award is an offer subject to acceptance by the condemnor and thus gives to the user of the sovereign

[4] Appellants refer (Br. 34) to *Empie* v. *United States*, 131 F. 2d 481 (C. C. A. 4, 1942) where the court stated that the conformity provision of the condemnation acts made applicable state law as to when title passes. That case involved a contest as to who should receive the award upon distribution. Since the interests of the United States were not involved, it did not appear upon the appeal. We submit that when, as in the instant case, the interests of the Government are involved the question is one of substance, not procedure, and local rules are irrelevant. *United States* v. *Miller*, 317 U. S. 369, 379–380 (1943); *United States* v. *Johns*, 146 F. 2d 92 (C. C. A. 9, 1944); *Kanakanui* v. *United States*, 244 Fed. 923 (C. C. A. 9, 1917). Similarly, local rules forbidding the taking of possession prior to payment are irrelevant because, under the Federal Constitution, possession can be taken in advance of payment. *Garrow* v. *United States*, 131 F. 24 724, 726 (C. C. A. 5, 1942), certiorari denied 318 U. S. 765; *Hurley* v. *Kincaid*, 285 U. S. 95, 104 (1932); *Yearsley* v. *Ross Constr. Co.*, 309 U. S. 18, 21–22 (1940).

> power of eminent domain an opportunity to determine whether the valuations leave the cost of completion within his resources. Condemnation is a means by which the sovereign may find out what any piece of property will cost. * * *

Thus, even when possession of the property has been taken under court order in the course of a condemnation proceeding the United States may still abandon the proceedings to acquire the interest sought. *Cherokee Nation* v. *Kansas Railway Co.,* 135 U. S. 641, 659–660 (1890); *Commercial Station Post Office* v. *United States,* 48 F. 2d 183, 185–186 (C. C. A. 8, 1931); *Mason City and Ft. Dodge R. Co.* v. *Boynton,* 158 Fed. 599 (C. C. A. 8, 1907). In such event, it is not liable for the estate or interest which it sought to acquire under its complaint in condemnation. *Cherokee Nation* v. *Kansas Railway Co.*, 135 U. S. 641, 659–660 (1890); *Moody* v. *Wickard,* 136 F. 2d 801 (App. D. C. 1943), certiorari denied 320 U. S. 775; *Commercial Station Post Office* v. *United States,* 48 F. 2d 183, 185–186 (C. C. A. 8, 1931); see *Suncrest Lumber Co.* v. *North Carolina Park Commission,* 30 F. 2d 121, 127–128 (W. D. N. C. 1929) (three-judge court); *Bank of Edenton* v. *United States,* 152 F. 2d 251, 254 (C. C. A. 4); *Howard* v. *Illinois Cent. R. Co.,* 64 F. 2d 267 (C. C. A. 7, 1933). As was held in *Moody* v. *Wickard, supra,* the trial court had no jurisdiction to award compensation for the interest sought in the petition after the United States filed its notice of abandonment.

Consequently, the fact that Section 5 of the River

and Harbor Act of July 18, 1918, c. 155, 40 Stat. 911, 33 U. S. C. sec. 594, authorized the United States to take possession of the property pending the condemnation proceeding did not, as appellants contend (Br. 33–37), create a vested right in the owners to compensation for the interest described in the complaint. *United States* v. *10.08 Acres of Land, Etc.*, 46 F. Supp. 138 (M. D. Pa. 1942); cf. *Scribner* v. *Wikstrom,* 34 A. 2d 658 (N. H. 1943). In *Cherokee Nation* v. *Kansas Railway Co.,* 135 U. S. 641 (1890), the statute involved provided that the Railway Company, the condemnor, might take possession pending a trial *de novo,* as to value by paying into court twice the amount of a referee's appraisal. The Supreme Court stated the effect of the entry into possession to be as follows (135 U. S. 641, 660):

> But the title has not passed, and will not pass, until the plaintiff receives the compensation ultimately fixed by the trial *de novo* provided for in the statute. So that, if the result of that trial should be a judgment in [the landowner's] favor in excess of the amount paid into court, the defendant [the condemnor] must pay off the judgment before it can acquire the title to the property entered upon, and failing to pay it within a reasonable time after the compensation is finally determined, it will become a trespasser, and liable to be proceeded against as such. And, in such case, if the plaintiff shall sustain damages by reason of the use of its property by the defendant pending the appeal, the latter will be liable therefor.

The rule referred to by appellants (Br. 40, 45–46)

that value is determined at the date of taking does not, as appellants seem to argue, mean that the Government by taking possession is bound to pay for the interest sought to be condemned and cannot thereafter abandon. The problem of the result of abandonment was not involved in any of those cases. In the cases cited the court simply referred to "date of taking" for the purpose of fixing the date of valuation and the date from which compensation for delay in payment, which is ordinarily measured by interest, was payable.[5] The decision did not, we submit, disagree with or overrule the principles that title does not pass until payment and that until title passes the proceeding may be abandoned (*supra,* pp. 16–20).[6]

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[5] For example, when possession is taken and thereafter a declaration of taking is filed, value is determined as of the date of taking possession even though the United States is not irrevocably committed and may abandon the taking up to the time the deposit is made under the declaration of taking. *Bank of Edenton* v. *United States*, 152 F. 2d 251, 254; *11,000 Acres of Land* v. *United States*, decided December 21, 1945 (C. C. A. 5). (Copies of the latter opinion, not yet reported, is submitted herewith). When possession is not earlier taken, value is determined as of the date title vests under the Declaration of Taking Act (*United States* v. *576.734 Acres of Land, Etc.*, 143 F. 2d 408 (C. C. A. 3, 1944), and if possession is not taken and no declaration of taking is used, value is determined as of the date of trial. *Carlock* v. *United States*, 53 F. 2d 926, 928 (App. D. C. 1931); *United States* v. *Crary*, 2 F. Supp. 870, 878–879 (W. D. Va. 1932).

[6] It should be noted that appellants are mistaken in interpreting *United States* v. *Miller*, 317 U. S. 369 (1943), to hold that "the property was taken when the project was planned" (Br. 40). The court simply held that in determining value at the date of taking, the element of enhancement in value due to the project should be excluded from consideration and it is clear from the opinion that the date of taking was the date of filing the declaration of taking and deposit of estimated compensation.

Thus, when the United States filed notice of abandonment (R. 73–74), the court lost jurisdiction to award compensation for the profit a prendre which, appellants claim, was sought in the petition. The only liability of the Government after abandonment was for the one year and eleven months' occupancy of the property. See cases cited, *supra,* p. 18. Appellants admit that the $1,745 plus interest awarded by the court represents just compensation for such temporary occupancy and the United States has not challenged this award by cross-appeal.

C. *In any event, appellants have been awarded compensation for all rights which the Government sought to condemn.*—As we have shown, appellants do not complain of the award of $1,745 as compensation for the temporary occupancy by the Government. Their claim is the Government sought a "profit a prendre" to take gravel and gold from the property (Br. 18–19). It may be assumed that the rights thus described are properly designated by appellants as an "incorporeal profit a prendre." Although the right of "uninterrupted use and occupancy" (R. 11–12) described would seem to be a separate and distinct right, broader than the mere right of entry for the purpose of removing the gravel, which is a part of a "profit a prendre,"[7] it is not believed that the Government's lia-

[7] "A profit a prendre confers two rights: A license which authorizes the licensee to enter upon the lands of the licensor, and a grant to the licensee of the things which he is permitted to carry away from those lands." *Forsyth* v. *Nathanson*, 139 Ore. 632, 11 P. 2d 1065 (1932). "The underlying principle of the right is that it carries the right of entry and the right to remove and take from the land the designated product or 'profit' ". *Richfield Oil Co.* v. *Hercules Gasoline Co.*, 112 Cal. App. 431, 297 Pac. 73 (1931).

bility turns upon any technical distinction as to the exact nature of the estate or interest sought and that a precise definition is unnecessary.

Prior to the institution of these proceedings negotiations were entered into between Government representatives and appellants. At that time a method by which the Government could use the gravel and yet appellants' rights to the gold be preserved was thoroughly discussed (R. 207–212, 215–225, 278–284). At the conclusion thereof appellants "shook hands" with the Government representatives on the arrangement (Br. 8, R. 280–282) and the specifications for removing the gravel which had been discussed in the negotiations were included in the bids published and in the contract between the Government and the contractor who was to build the dam (R. 215, 283).

When the Government filed its petition in condemnation on October 10, 1939 (R. 37), it did not seek simply a right for two years to remove the gravel which contained the gold. On the contrary, lengthy provision was made for safeguarding appellants' rights to the gold during the removal of the gravel (R. 6–10, 29–32). Appellants did not file an answer until March 25, 1941, one year and five months later (R. 57). This answer alleged that the detailed specifications for recovery of the gold were inadequate because no rate of extraction was specified (R. 43–45). In their brief in this Court, appellants assert that because of the absence of a limitation on the rate of production it was impossible for appellants to meet the conditions (R. 13). The only basis for this claim is the testimony of the landowners' witness Morrison. He testified

that when the matter of recovery of the gold by appellants from the gravel to be taken out by the United States was discussed prior to the institution of the condemnation proceedings he had asked how much material would be handled per hour and was told 100 cubic yards per hour (R. 221). Upon that basis the amount of water and electricity to be furnished by the United States was discussed and it was agreed that 2,100 gallons of water per minute and sufficient electrical energy to develop twenty horsepower would be sufficient to operate their gold recovery plant (R. 221). Stating that if the United States had removed and delivered gravel to them at a rate in excess of 100 cubic yards per minute the plant contemplated would not have been able to handle it, Morrison testified that it was learned after the condemnation proceeding was instituted (see R. 224–225) that the Government contractor already had a gravel plant with a capacity of 250 yards per hour which he insisted he was going to use (R. 223–224). It was admitted that no such plant was ever set up (R. 225) and there was no testimony that a gravel plant with a *capacity* of 250 cubic yards per hour could not be operated so as to comply with the provision in the complaint that the United States would construct its sand and gravel plant so as to permt the installation of specified gold recovery devices (cf. R. 7–9, 12, 30–32). It appears from the voluminous testimony introduced by appellants concerning the prior negotiations (see R. 207–212, 215–225, 278–284) that the method set out in the complaint for recovery of the gold by them at the time gravel

was removed by the United States was substantially the same as the method discussed in the negotiations (see R. 215–225). Consequently, the testimony does not warrant appellants' assertion that the "safeguards" set out in the complaint for the removal of the gold were of no value and could not have enabled them to recover the gold.[8]

Thus, it is clear that the Government did not intend to take the gold and that if the project had been carried out no gold would have been taken by the United States. Appellants rely upon the fact that

[8] While no such question was raised by the answer (cf. R. 44–45) it was said at the trial that there was one variation in the complaint from the specifications previously discussed concerning the gold removal. Morrison testified that in the conferences the gold recovery devices to be installed by the owner called for an 8-foot vertical drop for the finer material (that which would pass a ¼-inch screen) and a 20-foot vertical drop for the coarser material (that which would be retained on a ¼-inch screen, but would pass a 1-inch screen) (R. 216–218), whereas the complaint specified the reverse, i. e., a 20-foot drop for the finer material and an 8-foot drop for the coarser material (R. 9, 32). On cross-examination, the witness conceded that the alleged reversal of the specifications in the complaint may have been due to a typographical error (R. 236). It appears from a copy in the Department's files that the letter of June 14, 1939, from appellants to Mr. Hjelm, former United States Attorney, which appellants offered in evidence (R. 351–352), but which was rejected and has not been included in the record on appeal, states as follows: "We will require an 8-foot drop for recovery of gold from ¼-inch to 1-inch size for our sluice boxes, and a 20-foot drop for recovery of gold from ¼ inch and under size by our Ainlay Bowls." Thus the specifications in the petition were the same as those requested in appellants' letter. Moreover, there was no attempt to show what, if any, effect the alleged variation would have had on appellants' ability to extract the gold. It does not appear that appellants could not have installed a plant with the vertical drops they desired without interfering with the other specifications set out in the complaint.

the complaint stated that if the landowners should fail or refuse to follow the method for recovery of the gold, the United States "shall have the option to either take the said concrete aggregates without recovery of gold contents thereof, if any there be, or to carry out the requirements so failed or refused by the said defendants" (R. 9–10). While this statement was made in the complaint, it was not set forth in the prayer for relief when the United States specified the judgment which it sought (R. 28–34). It was obviously intended that the adequacy of the safeguards of appellants' rights to the gold should be determined before any judgment was entered and that if those rights could not be protected, an election should be made by the United States upon which alternative of the option the Government would seek judgment. Appellants recognized this because, in their answer, they alleged that further specifications would be necessary (R. 43–50). For example, after alleging that the plan set forth in the complaint might or might not be adequate for recovery of the gold dependent upon the speed of removal, the answer stated that if the defendants were unable to comply, an exact determination of their loss could not be made (R. 45–46). Thus, it is clear that if the Government had not abandoned the project, such deficiencies as might have existed in the complaint would have been remedied by amendment so that no gold would have been taken. Cf. *Karlson* v. *United States,* 82 F. 2d 330, 331 (C. C. A. 8, 1936).

If appellants' rights to the gold are safeguarded, the gravel by itself would not warrant a recovery. As appellants state (Br. 6): "It has no value for any other purpose [than gold mining] except the removal of concrete aggregates, if there were any local demand for aggregates, which there ordinarily is not." Demand of the Government cannot be considered and it is clear that there was no other demand for gravel that would affect the market value of the property (R. 269–270, 411); *Cameron Development Company, Inc.* v. *United States,* 145 F. 2d 209 (C. C. A. 5, 1944); *United States* v. *Rayno,* 136 F. 2d 376, 378–379 (C. C. A. 1, 1943), certiorari denied 320 U. S. 776.

We submit, therefore, that appellants' contention here is not well founded because even if the Government had proceeded with the project rather than abandoning it, the United States would have not taken the gold and appellants' rights thereto would have been preserved. The decision of the district courts in *United States* v. *9.94 Acres of Land in City of Charleston,* 51 F. Supp. 478 (E. D. S. C. 1943); *United States* v. *60,000 Square Feet of Land, Etc.,* 53 F. Supp. 767 (N. D. Cal. 1943); and *United States* v. *Bauman,* 56 F. Supp. 109 (D. Ore. 1943) cited by appellants (Br. 46–50) are irrelevant here since they were all attempting to solve the problems that result when the Government condemns a term for years of indefinite duration.[9]

[9] The Government does not agree with the reasoning of these decisions and with the manner in which the courts dealt with the problem. Other courts have taken a different view of the matter. *United States* v. *Certain Parcels of Lands, Etc.,* 55 F. Supp. 257,

To summarize.—We submit that appellants' claim to substantial compensation cannot be sustained for three reasons. First, contrary to appellants' argument, the obligation of the United States to make just compensation cannot exceed the owner's loss. Second, the Government abandoned the proceedings and the court thereby lost jurisdiction to award compensation for the so-called profit a prendre. Finally, even assuming arguendo that compensation could be awarded for the taking of the interest described in the complaint, it could not be the basis of an award of substantial compensation because rather than taking the gold, appellants' rights thereto were preserved, hence the only substantial value of the land was retained by them.

II

The trial court did not err in his rulings admitting and rejecting evidence

Appellants' statement of points to be urged upon appeal referred to certain alleged errors in the admission or rejection of evidence (R. 447–448). However, their brief does not contain any specification of errors relied upon as required by Rule 20 (2) (d) of this Court and, although some of the evidence and the rulings thereon are set out in the brief, and on page

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262–264 (D. Md., 1944); *United States* v. *Improved Premises*, 54 F. Supp. 469 (S. D. N. Y. 1944); *United States* v. *16.747 Acres of Land*, 50 F. Supp. 389 (Del. 1943); *In re Condemnation of Lands for Military Camp*, 250 Fed. 314 (E. D. Ark. 1918); *United States* v. *5.741 Acres of Land in Flushing & Arde Bulova*, 51 F. Supp. 147 (E. D. N. Y. 1943); *United States* v. *Entire Fifth Floor in Butterick Bldg.*, 54 F. Supp. 258 (S. D. N. Y. 1944).

26 it is stated that appellants assign as error a certain ruling, no separate argument is presented to support these points on appeal. Assuming that the points have been preserved, we submit that the rulings did not represent reversible error.

While point 2 complained of the admission of evidence of the market value of the land (R. 448), appellants admit that the value of the so-called profit a prendre for which they claim compensation "of course, cannot exceed the value of the fee" (Br. 46). Thus, on appellants' own theory the market value evidence was admissible and appellants' claim for $12,000 (Br. 51) is based upon the testimony of Government witnesses on cross-examination that the value of a right to remove gravel and minerals had the same value as the fee (Br. 30–33). Appellants do not challenge the finding of the district court that no gravel had been removed (R. 87) and appellants' counsel conceded below that this was the fact (R. 137). Thus points 1 and 3 (R. 447–448) present simply the legal question already discussed *supra,* pp. 12–21, whether appellants were entitled to substantial recovery when no gravel was actually taken.

Points 4, 5 and 6 (R. 448) relate to rulings permitting the Government to show the amount of gravel which had been estimated to be required for the Ruck-a-Chucky Dam (R. 106), rejecting appellants' attempt upon cross-examination to show that the Government intended to use the gravel at any site where this gravel would be more available and gravel would be required (R. 118–119) and excluding "proof offered by de-

fendants of negotiations" prior to the filing of the suit (R. 448). No mention is made of this last point and a great quantity of evidence was admitted concerning those negotiations (R. 207–212, 215–225, 278–284). This point on appeal (R. 448) apparently referred to the testimony of counsel for appellants (R. 337–357). One ground of the Government's objection was that the court already knew what the negotiations were and the matter was time-consuming (R. 338, 340). Appellants' argument does not tend to show error in the exclusion of this evidence.

The ruling attacked in Point 4, the admission of evidence as to the estimated amount of gravel needed for the dam, was clearly correct since the complaint sought the right to remove concrete aggregates "in such quantity and quantities and in such manner as may be found by the plaintiff expedient, necessary and proper in the carrying out of the construction of said Ruck-a-Chucky Dam and Reservoir project" (R. 11). The United States was seeking to acquire the right to remove gravel only for the Ruck-a-Chucky project (R. 4; Rivers and Harbors Committee Document No. 50, 74th Cong., 1st sess., pp. 3, 8, 25, 27) hence it was obviously relevant to show how much gravel might be needed for that project. *Karlson* v. *United States,* 82 F. 2d 330 (C. C. A. 8, 1936). Since the complaint limited use of the gravel to the Ruck-a-Chucky Dam, appellants' attempt to show that it might have been used on other dams was correctly rejected because the evidence would have been irrelevant. Moreover, all

of these objections become material only if the Government's contentions (*supra,* pp. 12–21) that it is not liable to make compensation for what it might have taken, but didn't, is rejected.

Appellants make the statement that if they had mined the gold during the period of the Government's occupancy they would have effected a net recovery of $138,000 to $150,000 and that, therefore, they lost interest amounting to $18,515 to $20,125 (Br. 16). However, they do not challenge the findings of the court below that there was no diminution in value of the land and that defendants have suffered no pecuniary loss beyond use and occupancy of the land for which just compensation was fixed at $1,745, plus interest (R. 87–88). Inasmuch as the best use of the property was for mining (R. 372, 425) the award for use and occupancy compensates appellants for the exclusion of them from the property. The award represents computation of interest upon the fee value of the property (R. 82, 386, 426–427). It is pure speculation as to how much gold there was in the property and as to what profits appellants might have realized therefrom. For example, it does not appear that the evidence upon which they rely for their assertion (Br. 7) included the cost of machinery, equipment, transportation and other costs involved in completing the sale of the gold (R. 336–337, 428). The possibilities of favorable operations are reflected in the market value of the property and they have been compensated for in the award made.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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